

NO. 33203

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

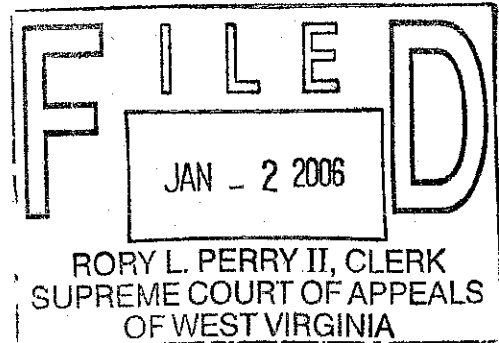
STATE OF WEST VIRGINIA ex rel.
STEPHANIE SUE GIBSON,

Petitioner,

v.

THE HONORABLE JOHN S. HRKO, Judge of
the Circuit Court of Wyoming County, and
G. TODD HOUCK, Prosecuting Attorney
for Wyoming County, West Virginia,

Respondents.



**RESPONSE TO PETITION FOR WRIT OF PROHIBITION
AND MEMORANDUM OF LAW IN SUPPORT THEREOF
ON BEHALF OF THE STATE OF WEST VIRGINIA**

Stephanie Sue Gibson (the "Petitioner"), by counsel, filed a Petition for Writ of Prohibition to enforce an alleged plea agreement, and to prohibit her trial as accessory before the fact to her husband, Billy Joe Gibson, Jr., in the commission of burglary, aggravated robbery, and malicious wounding. The State of West Virginia filed its initial response to the Petition, along with exhibits, on October 3, 2006. By order entered October 4, 2006, this Court issued a rule directing the Respondents to show cause why the writ of prohibition should not be awarded.

The State of West Virginia, real party in interest, by its counsel, G. Todd Houck, Prosecuting Attorney, for its response to the Petition herein says that there *was no* "plea agreement" between the Wyoming County Prosecuting Attorney's Office and Petitioner that could be enforced. Because Petitioner's testimony at her husband's trial was not needed, the State's offer of "use" immunity for that testimony became moot when Billy Joe Gibson entered his guilty plea. Accordingly, the Petitioner's trial should be allowed to proceed.

The State incorporates herein the factual recitation contained in the affidavit of Wyoming County Prosecuting Attorney G. Todd Houck, attached hereto as Respondents' Exhibit 4, as well as Exhibits 1, 2 and 3 filed with the State's initial response on October 3, 2006. The facts in a nutshell are that the Prosecuting Attorney offered the Petitioner "use" immunity for her testimony at her husband's trial, should he choose to waive the marital privilege. Because Billy Joe Gibson decided to enter a guilty plea, there was no need for the Petitioner's testimony at his trial.

However, there appears to be a misapprehension of the facts presented in the Petition, both in the circuit court and before this Court. At *no* time did the Prosecuting Attorney ever promise *not* to prosecute the Petitioner for her role in these crimes. Consequently, the petition for a writ of prohibition to enforce a non-existent "plea agreement" should be denied.

ARGUMENT

I. THE PETITIONER IS NOT ENTITLED TO IMMUNITY FROM PROSECUTION WHERE NO SUCH PROMISE WAS MADE.

In this case there was no specific promise that anything would happen to Ms. Gibson other than that the State would ask the Circuit Court to give her immunity if she refused to testify in her husband's case. The State had information from her husband's attorney that Mr. Gibson would waive his spousal privilege and allow his wife to testify. As was pointed out in the initial petition and initial response, had Mr. Gibson waived his right to assert the marital privilege to Mrs. Gibson to testify, the secondary issue was whether she would further refuse to testify since she was still in jeopardy from her own indictment. The State repeatedly told Mrs. Gibson's attorney that if she was called to the stand and refused to testify, the State would ask the Court to immunize her from so that she could testify. That was the extent of the agreement. There was never *any* discussion of what would happen in Mrs. Gibson's own trial.

In addition to the fact that Mrs. Gibson never sought nor received a plea agreement for her own trial, she never fulfilled her obligations under the terms of her testimony at her husband's trial. She never testified, nor even took the stand. Although she and her attorney were at the trial every day, that was the extent of her cooperation.

A person can be compelled to testify with or without objection, and be immunized from prosecution. *W. Va. Code* §57-5-2, provides:

In any criminal proceeding no person shall be excused from testifying or from producing documentary or other evidence upon the ground that such testimony or evidence may criminate or tend to criminate him, if the court in which he is examined is of the opinion that the ends of justice may be promoted by compelling such testimony or evidence. And if, but for this section, the person would have been excused from so testifying or from producing such evidence, then if the person is so compelled to testify or produce other evidence and if such testimony or evidence is self-criminating, such self-criminating testimony or evidence shall not be used or receivable in evidence against him in any proceeding against him thereafter taking place other than a prosecution for perjury in the giving of such evidence, and the person so compelled to testify or furnish evidence shall not be prosecuted for the offense in regard to which he is so compelled to testify or furnish evidence, and he shall have complete legal immunity in regard thereto.

Our Supreme Court of Appeals has held the grant of such immunity is not all encompassing, and can allow prosecution of the Defendant. This is especially true when the facts testified to precludes subsequent criminal prosecution for any facet of the offense to which his or her testimony relates. *State ex rel. Brown v. MacQueen*, 169 W.Va. 56, 285 S.E.2d 486 (1981). The use of the word "testimony" should not be lost here: in all cases the State found where the use of immunity precluded further prosecution, the Defendant actually testified. Stephanie Sue Gibson seeks prohibition of her indictment because she appeared at trial and perhaps wanted to testify. To the State's knowledge no Defendant has ever been prohibited just because he or she may have wanted to testify in a companion proceeding. Allowing Stephanie Sue Gibson and others to be freed from prosecution would be a prosecutorial nightmare. The State would be forced to free defendants from prosecution without even knowing what the defendant was going to testify about.

The attached affidavit by the Prosecuting Attorney is the extent of any "discussion" between the State and Stephanie Sue Gibson's attorney. All discussion were between the Prosecuting Attorney and Mrs. Gibson's attorney. An exhaustive review of both Mr. and Mrs. Gibson's files confirms there is not letter, note of conversation, phone conversation or phone message where any discussions of immunity whatsoever were held. The only discussion simply involved "ifs:" IF her husband waived his right to prohibit Stephanie Sue Gibson's testimony under the marital privilege,

and then IF Stephanie was called to testify, and IF she refused, THEN the State would offer her immunity from her testimony on the stand. There was no plea agreement to dismiss or in any way deal with Mrs. Gibson's charges, because there were too many unknowns in whether she would testify, and what in fact she would testify about. That places the situation, at best, in the nature of an anticipatory contract, in which the most important conditions remain unfulfilled.

Interestingly, and as will be more fully developed below, The Court in *Brown* went on to state that a Writ of Prohibition was not the property remedy. Mrs. Gibson's issue is properly raised in a motion dismissed, which was denied by the Circuit Court. A writ of prohibition does not lie from that denial, stating that "prohibition is not a proper proceeding in which to initiate the immunity claim. The extraordinary writ of prohibition speaks purely to jurisdictional matters." *Id.* 169 W. Va. at 62, 285 S.E.2d at 490.

II. AN ALLEGED "PLEA AGREEMENT" THAT HAS NOT BEEN REDUCED TO WRITING IS NOT ENFORCEABLE.

Stephanie Sue Gibson can produce no evidence of an agreement to dismiss her case because none exists. She can also no evidence that a plea was ever presented to and approved by the Court. Certainly, a written agreement, notes of conversation, or even testimony concerning the agreement could be probative. However none exist. Acceptance of an agreement by the circuit court would be probative. It does not exist, because no agreement ever happened.

"An implicit condition of every plea agreement is its acceptance by the trial court." *United States v. McGovern*, 822 F.2d 739, 743 (8th Cir. 1987); *State v. Waldron*, 218 W.Va. 450, 624 S.E.2d 887 (2005). In the present case, the parties never obtained the trial court's approval of their tentative bargain before they acted upon it. The reason begs the question: the matter did not get far enough to require a written agreement. "While we do not require that a plea bargain agreement be written, although that is the far better course, we do require substantial evidence that the bargain was, in fact, a consummated agreement, and not merely a discussion. Court approval, whether formal or informal, is advised." *State v. Wayne*, 162 W. Va. 41, 42, 245 S.E.2d 838, 840, 841 (1978)

(footnotes omitted) (emphasis supplied).. Nothing in the record indicates that the trial court ever gave even *implied* approval of a proposed plea or immunity by the Petitioner. *Cf. State ex rel. Gray v. McClure*, 161 W. Va. 488, 242 S.E.2d 704 (1978) (holding that defendant was entitled to present evidence of detrimental reliance on inchoate plea agreement with former prosecutor which had been orally approved by the circuit court).

“A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant’s prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.” Syl. Pt. 6, *Myers v. Frazier*, 173 W. Va. 658, 319 S.E.2d 782 (1984). In addition, “consideration must be given not only to the general public’s perception that crimes should be prosecuted, but to the interests of the victim as well.” Syl. Pt. 5, in part, *Myers, supra*.

This case involved a serious and brutal beating of an elderly gentleman where he was bound and left for dead in his own home. He was only found after a man who worked on his car went to find him. But for that circumstance, this would be a murder case. The interests of the victim are not promoted nor protected by letting Mrs. Gibson completely off the hook for doing nothing.

In addition to denying her motion to enforce her nonexistent plea agreement, the Judge Hrko more than adequately protected Mrs. Gibson from the State’s use of information gained from Mrs. Gibson in preparation for the trial of her husband. In fact, it can be argued that she is in a better position relative to her case than before her husband’s trial, even though she never testified nor did anything to benefit the State’s case against Mr. Gibson.

III. A WRIT OF PROHIBITION IS NOT THE APPROPRIATE REMEDY IN THIS CASE.

West Virginia Code § 53-1-1 [1923] provides that “a writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, it exceeds its legitimate powers.”

In this case, there is no question that Judge Hrko has jurisdiction over the subject matter in controversy. The second question then, is whether, having such jurisdiction, he has exceeded his legitimate power by refusing to dismiss the indictment. He has not.

In cases involving writs of prohibition, this Court has held:

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors planning in contravention of a clear statutory, constitutional or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance. Syllabus point 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979).

Syl. pt. 1, *State ex rel. Elish v. Wilson*, 189 W. Va. 739, 434 S.E.2d 411 (1993).

Appeal, and not prohibition, is the adequate and appropriate remedy because this case does not involve a court exceeding its jurisdiction. The right to prohibition must clearly appear before petitioner is entitled to the remedy. *Maynard v. Bronson*, 167 W. Va. 35, 277 S.E.2d 718 (1981). The writ does not lie to correct mere errors. Nor can a writ be used to usurp the functions of an appeal, writ of error or certiorari. *State ex rel. City of Huntington v. Lombardo*, 149 W. Va. 671, 143 S.E.2d 535 (1965). A writ will not issue to prevent a simple abuse of discretion by a trial court. *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). Prohibition will only issue in clear cases. *Brown v. Arnold*, 125 W. Va. 824, 26 S.E.2d 238 (1943). Prohibition only issues as a matter of right when a court is trying to proceed in a cause of action without jurisdiction. *Norfolk & W. Ry. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S.E.2d 196 (1898).

Recent cases have reaffirmed the proper standards and their application to determine whether or not a writ of prohibition is the proper remedy. This Court has held that a writ of prohibition will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *State v. Waldron*, 218 W. Va. 450, 624 S.E.2d 887 (2005); *State ex rel. Kees v. Sanders*, 192 W. Va. 602, 453 S.E.2d 436 (1994). Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will

review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue. *State ex rel. W. Va. DOT v. Madden*, 192 W.Va. 497, 453 S.E.2d 331 (1994).

The factual and legal background in this case is similar to *State ex rel. Brown v. MacQueen*, 169 W.Va. 56, 285 S.E.2d 486 (1981), in which this Court ruled a Writ of Prohibition could not be used to, in effect, appeal the denial of a Motion to Dismiss. Here the case was presented to the trial judge as a Motion to Enforce the Plea Agreement. The result is the same, and the Petition should be denied on that ground.

The court below had the jurisdiction to rule that Stephanie Sue Gibson was not entitled to enforce a nonexistent plea agreement, nor to have her case dismissed.

There has been no abuse of power by the lower court which violates Petitioner's rights. Therefore, this Court should not issue a writ of prohibition.

The circuit court's ruling should be upheld and the State should be permitted to proceed to trial on the merits of the case against the Petitioner as charged.

PRAYER

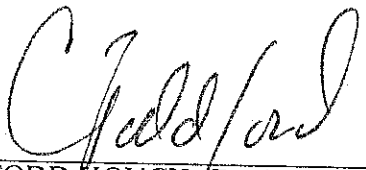
For the reasons assigned above, the State of West Virginia respectfully requests that the Order of the Circuit Court of Wyoming County be upheld and this case be remanded to the circuit court of Wyoming County so that a trial may be had to determine the truth of the matter therein.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By Counsel,



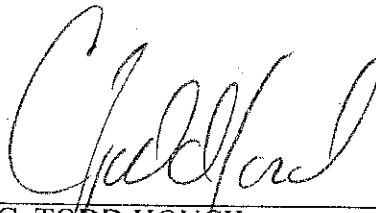
G. TODD HOUCK (Bar No. 5674)
PROSECUTING ATTORNEY
P O Box 462
Pineville, WV 24874-0462
Phone: 304-732-8000
FAX: 304-732-6052

CERTIFICATE OF SERVICE

The undersigned attorney for the State of West Virginia, Respondent, hereby certifies that on the 2nd day of January, 2007, a copy of the foregoing **RESPONSE TO PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM OF LAW IN SUPPORT THEREOF ON BEHALF OF THE STATE OF WEST VIRGINIA and MOTION TO ACCEPT SUBMISSION OF RESPONSE OUTSIDE** was served upon the Defendant Stephanie Sue Gibson, by and through her attorney, by FAX and by depositing a true copy of the same in the United States Mail, postage prepaid, addressed as follows:

Wilbert A. Payne, Esq.
340 S. Fayette St.
P O Box 5036
Beckley WV 25801-5036
FAX: 304-252-9439

and by delivering a true copy of the same to the Honorable John S. Hrko, Judge of the Circuit Court, by personal delivery.



G. TODD HOUCK
PROSECUTING ATTORNEY

VOLUNTARY STATEMENT

DATE 9-09-05 TIME 1738 PLACE Wyoming County Magistrate Co
Stephanie Gibson, am _____ years of age

and my address is 100 Elkins Cove Apt. D-3

I have been advised and duly warned by Ptl. Pierson / Ptl. Barclaw
 who has identified himself as Oceanic Officer

of my right to the advice of counsel before making any statement, and that I do not have to make any statement at all, nor incriminate myself in any manner.

I hereby expressly waive my right to the advice of counsel, and voluntarily make the following statement to the aforesaid person, knowing that any statement I make may be used against me on the trial or trials for the offense or offenses concerning which the following statement is herein made.

I declare that the following statement is made of my own free will without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

Q: What is your name?
Stephanie Gibson

Q: Where do you live?
Oceanic Apartments

Q: Are you married? If yes to who?
yes. Billy Gibson Jr

Q: What did Billy tell you ^{Today} ~~yesterday~~ about Mr. Webster?
O.P.

A: Billy told me he did it.

Q: What did he tell you he done.

A: He said he broke into the house + that man came in. Billy said he was hiding. Billy said he approached him. The old man tried to holler + He said he hit the old man because he had no choice. He said he tied him up + pulled him into the bathroom.

Q: Did he tell you if he took anything?

A: He said no there wasn't nothing to take

Q: Did Billy say he was by himself?

A: Yes

I have read this statement consisting of _____ page(s), and I affirm to the truth and accuracy of the facts contained therein.

This statement was completed at _____ M, on the _____ day of _____ 20____.

WITNESS:

VOLUNTARY STATEMENT

DATE _____ TIME _____ PLACE _____
I, _____, am _____ years of age

and my address is _____

I have been advised and duly warned by _____

who has identified himself as _____

of my right to the advice of counsel before making any statement, and that I do not have to make any statement at all, nor incriminate myself in any manner.

I hereby expressly waive my right to the advice of counsel, and voluntarily make the following statement to the aforesaid person, knowing that any statement I make may be used against me on the trial or trials for the offense or offenses concerning which the following statement is herein made.

I declare that the following statement is made of my own free will without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

Q: You told me earlier that Billy said he went through the back.

A: He said he went through the back window.

Q: What was Billy wearing that day?

A: Red shorts.

Q: The items we found in the bag on the search warrant (red shorts, black shoes) was Billy wearing that on the day he broke into Mr. Webster's house?

A: Yes.

Q: Where were you on the day Mr. Webster's house got broken into?

A: I went down the road + ran out of gas. My mom came + picked me up.

Q: Billy said I told Billy tell you if he waited on Mr. Webster to get home?

A: Yes.

Q: He said when he went if Mr. Webster wasn't home so he waited on him.

I have read this statement consisting of 2 page(s), and I affirm to the truth and accuracy of the facts contained therein.

This statement was completed at 1:50 P: M, on the 9 day of Apr. 2005

WITNESS: _____

X Stephanie Gilson

**IN THE CIRCUIT COURT OF WYOMING COUNTY
WEST VIRGINIA**

STATE OF WEST VIRGINIA

VS

CASE NO. 05-F-80

STEPHANIE GIBSON,

DEFENDANT.

ORDER

This 22nd day of September 2006 came the State of West Virginia by its Assistant Prosecuting Attorney, W. Richard Staton, and the defendant, Stephanie Gibson in person and by her counsel, Wilbert A. Payne for hearing on defendant's Motion to Enforce Plea Agreement in the above-styled felony action.

After introduction of evidence and argument of counsel and due consideration of the Court, the Court finds the defendant, Stephanie Gibson, never performed an act to testify against Billy Gibson, due to his entering a plea, which prevented her from being granted immunity for her testimony.

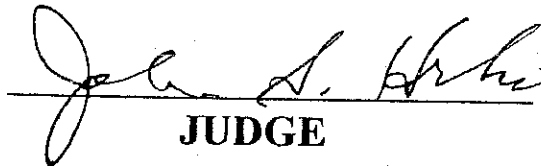
Exhibit 2

It is hereby **ORDERED** the Motion to Enforce Plea Agreement filed by defendant is hereby **DENIED**. **However**, the State will be prohibited from using any evidence received during **plea negotiations**, such as debriefing, statements or witnesses.

This matter will be scheduled for Trial on October 10, 2006 at 9:00o'clock a.m. Defendant's objections are hereby noted.

DATE: October 3, 2006

ENTER:

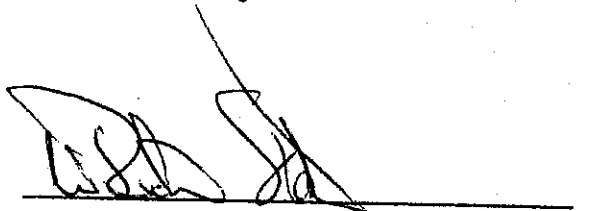

JUDGE

A TRUE COPY, ATTEST.
DAVID "BUGS" STOVER, CLERK

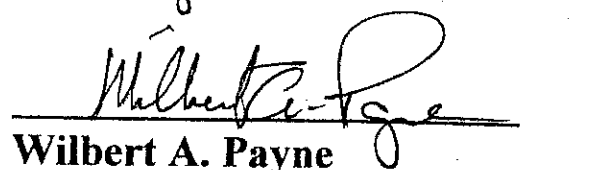
This the 3 day of Oct, 2006

By: Dev 752
Deputy.

Prepared by:


W. Richard Staton
Assistant Prosecuting Attorney

Approved by:

over the Defendant's
objection

Wilbert A. Payne
Counsel for Defendant

COPY

1

IN THE CIRCUIT COURT OF WYOMING COUNTY,
WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

vs.

CASE NO. 05-F-80

STEPHANIE GIBSON,
Defendant.

HEARING

Proceedings held in the hearing of the above
styled action before the Honorable John S. Hrko,
Judge, on September 22, 2006, when were present:

W. R. STATON, Assistant Prosecuting Attorney,
Wyoming County, West Virginia, Counsel for the
State.

WILBERT A. PAYNE, Esq., P.O. Box 5036, 340 South
Fayette Street, Beckley, West Virginia, 25801,
Counsel for the Defendant.

The Defendant in person.

Karen Stollings, Official Court Reporter.

Exhibit 3

1 THE COURT: This case is styled State of West
2 Virginia versus Stephanie Gibson; it is given a number 05-F-
3 80. It arises out of a 3-count indictment rendered by a
4 Grand Jury on October 3rd, 2005, charges Stephanie Gibson as
5 an Accessory Before The Fact of Burglary, Accessory Before
6 The Fact of Aggravated Robbery and Accessory Before The Fact
7 of Malicious Wounding. The case has been scheduled for
8 trial on -- when is it, October 14th?

9 MR. PAYNE: Tenth, I believe, Your Honor.

10 THE COURT: Tenth. Jeremy, check my calender,
11 would you please.

12 Ms. Gibson was on bail but she violated the terms of
13 her pretrial release and her bail was revoked as being a
14 flight risk on a previous day.

15 A motion was filed recently after the plea of guilty
16 was entered by Billy Gibson an alleged -- not alleged, now
17 convicted felon, and, Mr. Payne, you can argue your motion.

18 MR. PAYNE: If it please the Court. Your Honor,
19 basically, in this case, as I set out in my motion that I
20 have submitted to the Court, prior to this trial that was
21 set in the matter of Billy Gibson, I had had a conversation
22 by phone with the Prosecuting Attorney and he informed me
23 that he would allow my client to testify against her
4 husband, that her husband was going to waive any

1 husband/spouse immunity or whatever -- not immunity,
2 privilege that they might have had for her testimony as she
3 has provided a statement prior from the beginning of this
4 case in that her husband, who is Billy Gibson, told her that
5 he had did the crime that he was charged with and she was
6 going to testify and in light of her testimony she was given
7 immunity. Mr. Houck caused a subpoena to be issued. She
8 came over; I came over; she was to take the stand. And
9 before that, we were going to go through the preliminary
10 stages of Fifth Amendment of her giving testimony for self
11 incriminating testimony and he was going to say that he
12 would give her immunity. I believe that although this plea
13 agreement wasn't in writing the rule from State v. Wayne,
14 that I have cited in my memorandum, says that it is best to
15 have it in writing but it can be enforced.

16 Mr. Gibson, I believe, plead guilty based on her going
17 to testify against him and all the other evidence that was
18 provide against him.

19 Also I would like for the Court to know that we through
20 our investigation, and through my investigator, provided
21 Mr. Houck with a material witness to prove that there was
22 some unusual circumstances on the day that this incident
23 happened;

4 One, that Mrs. Gibson was at home. Sometime later,

1 Mr. Gibson came back to the house and he had changed
2 clothes, and we provided this witness for him.

3 She initially -- I put her out as a witness for us when
4 we were going to go to trial and that trial was postponed
5 and she was placed on bail at that time.

6 And since he plead guilty, she's been in jail and she
7 wasn't released. I was hoping and thought that she would
8 been released after he had plead guilty and she wasn't.
9 Therefore, I'm asking the Court to enforce the immunity
10 because based on her testimony and her willingness to
11 testify she would have been released any way.

12 THE COURT: What is the State's position?

13 MR. STATON: Your Honor, the facts that Mr. Payne
14 that he set in his motion, that he's indicated here, are
15 essentially correct. Where there may be disagreement is on
16 the application of those facts in this situation.

17 There is no question that Mrs. Gibson was here every
18 day and prepared to testify. Her testimony was not needed
19 because the plea. On the State's part there was always
20 concern about her testimony because we believed that it
21 might be inconsistent from her statement and further we were
22 concerned about the fact that Mr. Gibson had waived the
23 privilege, which kind of scared us because he didn't
4 completely block her testimony. So I don't know from that

1 that we can say -- and we'll never know -- I don't know from
2 that that we can that Mr. Gibson entered this plea because
3 of the threat of Mrs. Gibson testimony, that's just
4 something that we will never know. But this is somewhat in
5 the nature of a anticipatory contract where she has promised
6 to testify truthfully and never got the opportunity to do
7 so, through no fault of her own. The question then is, if
8 you have an agreement but you can't put it into place is it
9 still enforceable against her?

10 He is correct about the recitation about the
11 immunities. We had intended to give her immunity for her
12 testimony at the trial. We had recognized and discussed
13 with Mr. Payne and others that the use of her statement and
14 other items for her testimony in Mr. Gibson's trial would
15 then be inadmissible against her in her subsequent trial, so
16 that is what we were considering, as well.

17 In regard to the provision of the material witness,
18 that is just something that I know nothing about. I can't
19 comment if it is correct.

20 THE COURT: A brief response?

21 MR. PAYNE: Only that we relied on the State
22 enforcing this agreement, Your Honor, and allowing her to go
23 free afterwards. It is not our fault that he plead guilty,
24 but it is a part of our position is that because of her

1 testimony that she was going to give he did plead guilty,
2 along with the material evidence that was produced by us.
3 We feel that we are in a situation where she is still in
4 jail even after she was going to turn over any information
5 that she had. She has never wavered -- in as far as using
6 her statement against her, she never has admitted to being a
7 part this crime and that Billy Gibson acted on his own. She
8 was not there and even if we go to trial the same witness
9 that we provided the State will be used in our defense. She
10 wasn't there at the time and that's just what the facts are.

11 THE COURT: The facts you have related to me are
12 basically what I observed during the trial of Mr. Gibson and
13 what the State relates to me is essentially true. West
14 Virginia Code 57-3-3 provides that neither spouse without
15 the consent of the other are allowed to testify against
16 them. What that means is that in order for Ms. Gibson to be
17 permitted to testify to the jury her husband had to fail to
18 object to her taking the stand and presenting testimony. We
19 never got to that stage.

20 You cite in your brief the case of State v. Wayne. It
21 is true that plea bargains are not required to be in writing
22 -- most aren't, that is true. You also cite the case of
23 Brooks v. Narick, a West Virginia case that I'm pretty
4 familiar with. A person on a drug charge, I think it was in

1 Marshall County, entered a plea of guilty in exchange for
2 the State dropping several felony charges, giving him a 60-
3 day confinement period in Huttonsville for an evaluation and
4 cost. If the evaluation was favorable, the State would not
5 reject probation. Well, the report came back neutral and
6 the State rejected the probation. The Judge would not
7 enforce the plea bargain agreement, and, in fact, the
8 prosecuting attorney returned indictments on all the charges
9 that he had agreed to dismiss. Based upon that, Mr. Brooks
10 got a petition for a writ of prohibition in the West
11 Virginia Supreme Court of Appeals and the writ of
12 prohibition was granted. They were not permitted to try
13 Mr. Brooks, and they placed him back in a good a position as
14 they could prior to this plea agreement -- not exactly like
15 the facts of this case. Plea bargains are contractual in
16 nature. It is what is termed a unilateral contract. It's
17 where one party makes a promissory offer, such as if you
18 testify against Billy Gibson, then we'll give you immunity,
19 and the other party accepts by performing an act to fulfill
20 the contract. In this case there was no act performed by
21 Mrs. Gibson, she did not testify. The reason that she
22 didn't testify was also out of her control. It was in the
23 control of Billy Gibson and her testimony was always under
4 the control of Billy Gibson. He entered a plea of guilty

1 and prevented her from performing the act to which she was
2 promised, immunity. He never got the opportunity to either
3 permit or deny the right to testify.

4 The law in this county is not designed to determine
5 what the Courts do based upon what other people do. If
6 someone robs an individual, the police can't go to his home
7 that night and take his car. They can't go to his home and
8 beat him. We have rules of law and procedure that are set
9 up in advance of crimes. We're required to operate in a
10 certain way no matter how egregious the conduct of the
11 accused may be. We have to provide the same rights and
12 privileges to rapist and murders as we do to people who
13 steal candy bars. Everyone in this county has the same
14 rights under our law. We can't have it different for every
15 body. It cannot be that way or our government will not
16 work.

17 In this case negotiations with the State have tainted
18 the process. I will not enforce the plea bargain agreement
19 and turn your client loose, but I will not be a party to a
20 mockery of our judicial process. I am the keeper of justice
21 as is not as anyone interprets it but as it is written in
22 this book. There are many situation when people are
23 forgiven by juries for what they do; I can't do that. I
4 have to do what is in this book. And I am not going to

1 release her because I do not believe the facts of the
2 situation got to such a point to where the law requires it.
3 But as I said, I cannot make a mockery of our judicial
4 procedures. And as I said, negotiations with the State have
5 tainted the process in this case. She must be restored to
6 her original position so that justice can prevail. The
7 state will be prohibited from introducing any evidence that
8 they gleaned or received from her or from her attorney
9 during this plea negotiation or any evidence derived from
10 the plea negotiation, cannot be -- it's sort of like the
11 poisonous tree doctrine. I can't allow the State to make an
12 agreement and then say that it didn't exist and use the
13 fruits that they have garnered during the agreement. So,
14 therefore, any debriefing statements that were given by
15 Ms. Gibson or by you, Mr. Payne, and any evidence or
16 witnesses derived from the evidence that you or Ms. Gibson
17 gave the prosecuting attorney will be permitted to be used
18 during her trial on October 10th.

19 I will ask the State to prepare an order accordingly,
20 show your objection and exception. And I will advise you
21 that, I think, that you have the right to file a writ of
22 prohibition in the West Virginia Supreme Court of Appeals
23 immediately. I don't think it would be considered an
24 interlocutory appeal. It would be a petition for a writ of

1 prohibition, just as was filed against Judge Narick in this
2 book versus Narick, 162 WV 415, which was a 1978 case. Show
3 Mr. Payne's objection and exception, and this matter is
4 concluded.

5 (Whereupon, these proceedings were concluded on
6 November 22, 2006)

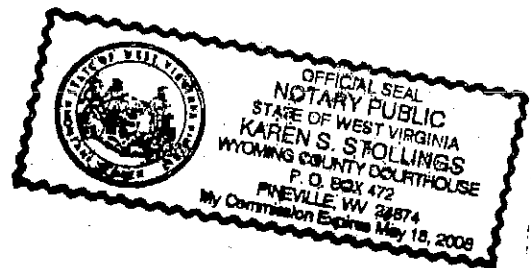
7 -0-

1 STATE OF WEST VIRGINIA,
2 COUNTY OF WYOMING, to-wit:

3 I, Karen Stollings, Official Reporter for
4 Wyoming County, West Virginia, do hereby certify that the
5 foregoing is a true and correct transcript of the
6 proceedings had in this matter on the aforementioned date as
7 reported by me with machine shorthand and transcribed by me.
8 Given under my hand this 3rd day of October, 2006.
9

10
11 Karen Stollings, CCR
12

13 Karen Stollings, Official
14 Reporter, Circuit Court of
15 Wyoming County, West Virginia,
16 Notary Public



NO. 33203

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
STEPHANIE SUE GIBSON,

Petitioner,

v.

THE HONORABLE JOHN S. HRKO, Judge of
the Circuit Court of Wyoming County, and
G. TODD HOUCK, Prosecuting Attorney
for Wyoming County, West Virginia,

Respondents.

AFFIDAVIT

Before me, the undersigned Notary Public in and for the State and County aforesaid,
personally appeared **G. TODD HOUCK**, who being first duly sworn by me, deposes and says:

1. That he is the duly elected Prosecuting Attorney of Wyoming County, West Virginia,
and served in that capacity in all matters related to this case.
2. That he was the lead prosecutor in the case of *State of West Virginia v. Billy Gibson*,
the husband of Stephanie Gibson.
3. Both parties were charged in connection with the brutal beating of Lancaster
Webster, an eighty-eight (88) year old gentleman, in Mr. Webster's home. Mrs.
Gibson was charged as an accessory to the crime, and related charges.
4. Mrs. Gibson had given a statement implicating herself and her husband. A copy of
the statement was filed with the Court in the State's initial response, and is attached
to this response as "Exhibit A," and incorporated by reference.

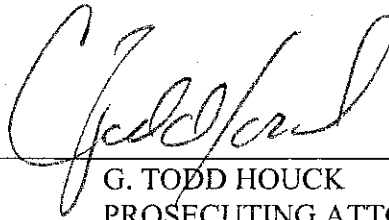
Exhibit 4

5. On August 21, 2006, the jury trial of the husband, Billy Gibson began. The State of West Virginia intended to call Mrs. Gibson in the trial. If her husband Billy Gibson asserted spousal privilege pursuant to *W. Va. Code* §57-3-3, or if Stephanie Gibson asserted her right against self-incrimination pursuant to the Fifth Amendment to the United States Constitution, the State intended to offer Mrs. Gibson use immunity in order to elicit either testimony or confirmation of her statement.
6. Billy Gibson's attorney, Keith Flinchum, indicated to me that Billy Gibson intended to waive spousal privilege and allow Stephanie Gibson to testify. This indication raised my concern whether Mrs. Gibson was going to recant the statement or otherwise offer evidence which Billy Gibson viewed as more favorable to him than any other testimony she would have given. Therefore I was concerned whether she would testify truthfully in accordance with her statement, or otherwise.
7. In discussions with Stephanie Gibson's attorney, Wilbert Payne, I stated that I intended to call Stephanie Gibson as a witness, and would grant her use immunity if she asserted spousal privilege or her right against self-incrimination.
8. Before completion of *voir dire*, Billy Gibson agreed to enter a plea to Malicious Wounding, and was sentenced accordingly.
9. Stephanie Gibson was never called upon to testify, and was not offered nor given any type of immunity or protection from prosecution. She did appear every day for trial, with her attorney, and pursuant to her subpoena.
10. Following Mr. Gibson's trial, Stephanie Gibson's attorney filed a Motion to Enforce the Plea Agreement, which is the basis for this appeal. In response to the motion, the Honorable John S. Hrko, Judge of the Circuit Court, ruled that there was no plea agreement to enforce, but further ruled that any evidence the state obtained as a result

of Mrs. Gibson's anticipated testimony could not be used against her.

11. No plea agreement, written or verbal, was entered into between the State and this Defendant, because no plea agreement was ever agreed to. The State would have considered her cooperation or offer of cooperation in handling Stephanie Gibson's case. In fact, the State did consider these matters in its plea offer to Mrs. Gibson after Mr. Gibson's plea. *See*, attached letter from W. Richard Staton, Assistant Prosecuting Attorney, to Wilbert Payne, dated September 22, 2006.
12. The State cannot enforce a plea agreement with Mrs. Gibson, because no agreement was ever made.

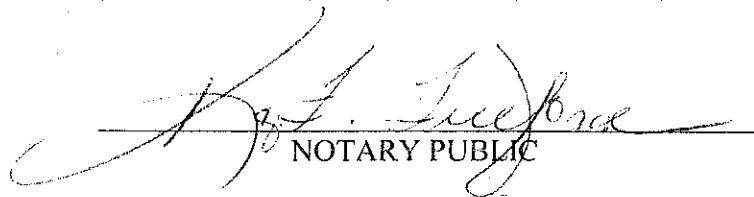
Further the affiant sayeth naught.



G. TODD HOUCK
PROSECUTING ATTORNEY

Take, subscribed and sworn to before me this 2nd day of January, 2007.

My commission expires: April 25, 2010.



NOTARY PUBLIC

C:\Documents and Settings\Rick\My Documents\Gibson Stephanie\gibson affidavit by todd.wpd